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Before the
Federal Communications Commission
Washington, D.C. 20554

JAN 21 1992

Federal Communications Commission
Office of the Secretary

In the Matter of

Advanced Television Systems and
Their Impact Upon the Existing
Television Broadcast Service

MM Docket No. 87-268

To: The Commission

**Reply Comments of Association of America's
Public Television Stations, Corporation for Public
Broadcasting, and Public Broadcasting Service**

The Association of America's Public Television Stations
("APTS"), the Corporation for Public Broadcasting ("CPB"), and
the Public Broadcasting Service ("PBS") (collectively referred to
as "Public Television") submit these reply comments in response
to certain of the comments filed in response to the Commission's
Notice of Proposed Rulemaking released November 8, 1991
("Notice") in the above-captioned proceeding.¹

**I. The Commission Should Not Adopt a Policy Permitting
Noncommercial Stations to Sell Their ATV Allocations.**

Golden Orange Broadcasting Co., Inc. ("Golden Orange"),
licensee of commercial station KDOC-TV, Anaheim, California,
supports the Commission's proposal to reserve ATV channels for
noncommercial stations. See Golden Orange Comments at 8. It
also suggests that noncommercial entities be exempt from any
deadlines imposed by the Commission for filing ATV applications

¹ To the extent that Public Television has already fully
addressed in its opening comments issues raised by other parties
in their comments, Public Television will not restate its
position. These reply comments address only those issues raised
by commenting parties that Public Television did not fully and
explicitly address in its opening comments.

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or constructing ATV facilities. See id. In the event that an eligible noncommercial station chooses not to apply for its ATV authorization, however, Golden Orange suggests that the Commission allow the station to sell its ATV allocation on a non-reserved basis, provided any consideration received by the station is used for its NTSC operations. Id. at 8-9.

Public Television strongly urges the Commission not to adopt this latter proposal. In its opening comments, Public Television expressed reservations concerning the Commission's proposal to permit negotiated ATV channel swaps between commercial and non-commercial broadcasters.² Public Television's opposition to Golden Orange's proposal to permit noncommercial stations to sell their ATV allocations springs from the same concern.

Reserved noncommercial allocations are held in trust by local licensees which are obligated to use those allocations to serve the American public. Reservations, by their nature, are

² See Notice at ¶ 22; Public Television Comments at 17-19. Public Television urged the Commission to defer a decision on whether to permit channel swaps between commercial and noncommercial licensees until it has sufficient data to determine whether there may be circumstances in which such an exchange might benefit both licensees without impairing public television service generally. See Public Television Comments at 17-19. At this time, not enough is known about ATV propagation characteristics and coverage areas to assess whether ATV channel exchanges could adversely affect public television service. See id. For obvious reasons, Golden Orange's proposal poses a much greater risk to public television service than the Commission's proposal to permit ATV channel swaps. While channel swaps might, in some cases, diminish the quality of ATV service offered by non-commercial stations, permitting noncommercial stations to sell their reserved channels would result in the loss of noncommercial ATV service entirely in some communities.

intended to protect spectrum for future noncommercial use in the public interest. The sale of this valuable resource in order to alleviate short-term economic difficulties would deprive future generations of the kinds of program services offered by public television, and thus run contrary to the purpose of the reservations.

Furthermore, given the Commission's intention that ATV service eventually supplant NTSC service, the sale by noncommercial stations of their ATV allocations could eventually result in the loss of public television service in some communities altogether. This result would be utterly at odds with the Congressional policy of fostering universal public television service and, specifically, public television service comparable in technical quality to commercial service. See Public Television Comments at 3-8, 10 n.9.³

For these reasons, the Commission should reject Golden Orange's proposal to allow noncommercial licensees to sell their ATV allocations.

³ In addition, to the extent that Golden Orange advocates allowing the sale of VHF ATV channels reserved for noncommercial use, its proposal would violate P.L. 101-515, the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1991, 102 Stat. 2136-37, November 5, 1990 (no funds appropriated to the FCC may be used to diminish the number of VHF channel assignments reserved for noncommercial educational television stations). See Notice at note 55.

II. The Commission Should Reject Proposals to Alter the Secondary Status of Low Power Television Stations in This Proceeding.

A number of low power television licensees ("LPTV") offer a variety of proposals to protect LPTV interests. Several of those proposals would also, in effect, alter the secondary status of LPTV stations. Public Television does not object to efforts to accommodate LPTV and translator stations in the transition to an ATV environment,⁴ but it vigorously opposes any suggestion that would change LPTV's secondary status in this proceeding. Indeed, any such proposal is beyond the scope of this rulemaking and raises issues that should be considered in a separate proceeding.

Among the LPTV proposals of concern to Public Television is the suggestion of Polar Broadcasting, Inc. that LPTV stations, along with satellite and translator stations, be given priority in applying for ATV channels over full-service television permittees and parties with applications for construction permits on file as of the date of adoption of the Notice.⁵ In the same vein, Communicasting Corporation proposes that full-service stations compensate LPTV licensees for engineering costs they

⁴ This is basically the view expressed by the Community Broadcasters Association, the trade association representing LPTV stations, in its comments filed December 19, 1991.

⁵ See Polar Broadcasting Comments at 2. Insofar as Polar Broadcasting proposes that LPTV licensees have priority over parties with applications for full-service stations on file as of the day the Notice was adopted, Polar would also, presumably, advocate giving LPTV licensees priority over non-commercial entities who later file applications for reserved channels. That position is inconsistent with the position advanced by Public Television in its opening Comments.

incur in moving to a new channel or, if a new channel cannot be found, that the ATV licensee compensate the LPTV licensee for the "going concern" value of its station.⁶ Third Coast Broadcasting, Inc. makes a more frontal assault on LPTV's secondary status, arguing that "LPTV was never established in B.C. 78-253 as being secondary to HDTV."⁷

These proposals would all essentially change the secondary status of LPTV stations and diminish the Commission's ability to preserve spectrum for noncommercial educational use. Affording LPTV licensees the types of protections and priorities they request would jeopardize the availability of ATV channels for noncommercial permittees, applicants and vacant reserved channels, and thus make it difficult for the Commission to adhere to its long-standing commitment to fostering the development of public television service through channel reservations.⁸ Public Television therefore opposes these proposals to afford LPTV licensees rights inconsistent with their secondary status.⁹

⁶ Comments of Communicasting Corporation at 2.

⁷ Third Coast Broadcasting, Inc. Comments at 4.

⁸ See Public Television Comments at 3-7.

⁹ Telemundo Group, Inc., a distributor of Spanish-language programming to LPTV stations and others, urges the Commission to allow displaced LPTV stations to migrate to vacant ATV and NTSC channels, including those reserved for educational use. It is not clear from Telemundo's Comments whether Telemundo is proposing such use on a secondary basis or whether it is proposing that LPTV stations be allowed to use those channels on a primary basis. Public Television has no objection to Telemundo's proposal as long as LPTV's use of the
(continued...)

In addition to these policy reasons for opposing the proposed upgrading of LPTV stations' status, Public Television believes that it is inappropriate, as a legal and policy matter, for the Commission to consider those proposals in this proceeding. Agencies are required to give clear notice of proposed changes in their rules and may not adopt rule modifications in response to comments filed in a rulemaking proceeding if the modifications are outside the scope of the agency's notice of proposed rule making.¹⁰ Since the Notice in this proceeding did not contain any suggestion that the Commission might consider a change in the status of LPTV stations, proposals that would effectively change their status are beyond the scope of this proceeding.¹¹ As such, they cannot be adopted in this proceeding. Moreover, even if the Commission were inclined to consider such a change in the status of LPTV

⁹(...continued)
channels is secondary; Public Television strongly objects to the proposal, for the reasons set forth in the text, to the extent that Telemundo is suggesting that LPTV stations be allowed to use vacant reserved channels on a primary basis.

¹⁰ See, e.g., McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 1323 (D.C. Cir. 1988); Natural Resources Defense Council, Inc. v. EPA, 824 F.2d 1258, 1283-86 (1st Cir. 1987); AFL-CIO v. Donovan, 757 F.2d 330, 338-40 (D.C. Cir. 1985).

¹¹ In the Notice, the Commission proposed to allow low-power stations displaced by new ATV assignments to apply for a vacant channel in the same area without being subject to competing applications -- the same LPTV displacement rule now in effect. See Notice, ¶ 32. The Commission proposed no change in the secondary status of LPTV and translator stations, however, stating that "[t]hey must yield to new ATV operations just as they would be required to yield to existing full-service operations." Id.

licensees, any such change raises a host of complex issues unrelated to the issues in this proceeding. Those clearly severable issues should be addressed in a separate and independent proceeding, and not as part of this already complex and difficult rulemaking.

**III. It is Premature for the Commission to Decide
Now That Cable Systems Should Not Be Required
to Carry ATV Broadcast Programming.**

In its comments, the National Cable Television Association, Inc. ("NCTA") expresses concern that cable operators may be faced with the prospect of having to double the amount of capacity they devote to broadcast retransmission "in order to deliver the same amount of broadcast programming now being provided to subscribers" once broadcasters begin operating in both NTSC and ATV formats. NCTA Comments at 5.¹² While NCTA concedes that normal upgrades in plant capacity combined with increased use of fiber and the introduction of digital compression may provide sufficient capacity to accommodate most of the demand for cable carriage by broadcast stations and other program delivery services, it cautions that these developments will not "happen overnight" and that they are "unlikely to be fully in place in the early days of the transition to HDTV." Id.

¹² NCTA appears to assume that broadcasters will simulcast the same programs on their NTSC and ATV channels. The Commission requested comment in the Notice on whether it should adopt a simulcast requirement, and virtually all of the broadcasters that filed comments, including Public Television, vigorously opposed imposition of a simulcast requirement, at least during the early years of the transition to ATV. See Joint Broadcasters Comments at 27-30; Public Television Comments at 29-30.

Accordingly, NCTA urges the Commission to afford the cable industry "flexibility to structure its delivery of ATV service in a manner that ensures the successful transition to the new environment for its subscribers." NCTA Comments at 5-6. What NCTA asks the Commission to give the cable industry in the name of "flexibility," however, is complete freedom from cable carriage requirements at every stage of the transition to an ATV environment; it asserts that cable systems "should not be subject to any mandatory carriage requirements or other obligations during any phase of the process." Id. at 6.

Public Television's views on cable carriage requirements are well known to the Commission. In comments and reply comments filed in MM Docket No. 90-4 and MM Docket No. 84-1296,¹³ APTS urged the Commission to adopt the agreement regarding cable carriage of public television stations reached by APTS and NCTA and endorsed by the House of Representatives, the Senate Commerce Committee, and the Commission itself. APTS explained why cable carriage of public television stations is necessary in order to achieve Congressional and Commission goals for public television. Without cable carriage, public television's ability to reach American homes will be materially impaired and the objective of

¹³ See Comments of APTS, MM Docket No. 90-4 (February 14, 1991); Reply Comments APTS, MM Docket No. 90-4 (March 1, 1991); Comments of APTS in MM Docket No. 90-4 and MM Docket No. 84-1296 (September 25, 1991); Reply Comments of APTS in MM Docket No. 90-4 and MM Docket No. 84-1296 (October 25, 1991).

making public television programming accessible to as many Americans as possible will be undermined.

APTS also pointed to a substantial body of evidence, and presented additional empirical data, demonstrating that local public television stations have been dropped from cable systems throughout the country at an alarming rate since the cessation of must-carry requirements. As a consequence, the financial viability of these stations and their ability to continue providing unique noncommercial program services to their local communities is being jeopardized. Public Television believes that these considerations apply equally to the carriage of ATV signals by cable systems.

These considerations clearly require, as noted in the Joint Broadcaster Comments,¹⁴ that the Commission address the cable carriage of ATV signals during the transition to the ATV. While Public Television recognizes that the Commission may not have sufficient information to adopt specific carriage requirements at this juncture, it is manifestly premature to determine now, as NTCA urges, that cable systems will be unable to carry both NTSC and ATV public television programming. While NCTA is certainly correct in asserting that massive increases in cable plant capacity as a result of normal upgrades in capacity, increased use of fiber and digital compression will not happen "overnight," neither will ATV service be introduced overnight. Indeed, even

¹⁴ See Joint Broadcaster Comments at 38-41.

optimistic projections do not envision the introduction of broadcast ATV service for at least five years -- and many industry observers believe it will take longer than that.¹⁵

That is a long time given the rapid pace of technological change. The history of cable's deployment of new technologies indicates that the projected massive increases in cable system capacity as a result of digital compression and other techniques may well be implemented in time so that cable systems can carry NTSC and ATV broadcast signals without impairing cable operators' legitimate interest in offering their subscribers diverse programming.¹⁶ Clearly, at this early stage of ATV development, it is premature and unnecessary for the Commission to decide, in the name of affording cable operators "flexibility," that they should not be subject to "any mandatory carriage requirements or other obligations during any phase of the process."

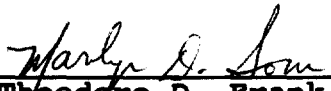
¹⁵ Before broadcast ATV service can become a reality in the marketplace, the Commission must resolve numerous complex issues in this proceeding, adopt an ATV technical standard, allocate ATV frequencies and process ATV applications; manufacturers must develop and produce ATV equipment; and television stations must construct ATV facilities.

¹⁶ John Malone, the president of Tele-Communications Inc., which is the largest cable company in the nation, predicted about two months ago that cable systems will begin providing digital compression (and increased channel capacity) to homes in 18 to 24 months, with "large scale" rollout in two to two-and-a-half years. See Broadcasting, December 9, 1991, at 28-29 ("Digital compression may be coming faster than many in the cable industry had thought, and the question remains whether programmers will be ready to meet the hastening challenge of filling the new channels compression will make available.")

CONCLUSION

For the foregoing reasons and those set forth in Public Television's opening comments, the Commission should establish allocations and regulatory policies for ATV that protect and foster the development of public television service.

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Dated: January 21, 1992

CERTIFICATE OF SERVICE

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